

BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION  
STATE OF MONTANA

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MIKE RADAKOVICH,	)	
	)	
Appellant,	)	OSPI 260-95
	)	
vs.	)	DECISION
	)	AND ORDER
BOARD OF TRUSTEES,	)	
SCOBEY SCHOOL DISTRICT	)	
NO. 1, SCOBEY, MONTANA,	)	
	)	
Respondent.	)	
	)	

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**PROCEDURAL HISTORY**

Mike Radakovich is appealing the September 14, 1995, decision of Larry Stollfuss, acting Daniels County Superintendent of Schools, affirming the Scobey School District No. 1 Trustees' [hereinafter "the District" or "the Trustees"] decision to terminate Mr. Radakovich.

In the Spring of 1994, the District decided a reduction in force [RIF] was necessary because of a reduction in the District's maximum general fund budget allowed by statute (§§ 20-9-306 - 308, MCA). District Superintendent Dustin Hill recommended that both a full-time elementary and a full-time high school position be eliminated as well as a reduction in 3 part-time positions. He recommended that the Trustees eliminate a high school social studies position and decide who would be RIF'd from that position based on seniority, evaluations where possible, and multiple endorsements. The Trustees accepted his recommendation. The District

actually had no method for using the evaluations as a ranking tool, however, and the Trustees did not use evaluations in the process.

Mr. Radakovich was a tenured teacher hired in 1987, with seniority over fifteen other teachers employed by the District. His only certificate endorsement was in social studies. Four other teachers employed by the District were also endorsed in either social studies or history. These four individuals all had at least two endorsements. Mr. Radakovich was senior to two of the four. One hired in 1988 had endorsements in social studies, P.E. and elementary. One hired in 1993 had endorsements in history and math (Respondent's Exhibit 6 (Superintendent's Exhibits #3B and #4B)).

On March 21, 1994, the Trustees sent Mr. Radakovich a notice of his recommended termination and notice of his hearing rights. The notice included a copy of the Superintendent's letter to the Trustees stating his reasons for recommending Mr. Radakovich's termination. Those were:

1. The position held by Mike Radakovich [social studies] during the 1993-1994 school year must be discontinued;
2. Mike Radakovich has no other certification or licensure which would permit his continued employment as part of the School District's professional instructional staff and as a member of the Scobey Education Association Bargaining Unit; and
3. Since Mr. Radakovich's position is to be eliminated and since Mr. Radakovich has neither the licensure or certification for another position within the teacher's bargaining unit, I am therefore recommending that he be terminated.

Respondent's Exhibit 6 (Superintendent's Exhibit #5-1).

Mr. Radakovich requested a hearing before the Board, which was held on April 12, 1994. The Board decided to RIF him and. Mr. Radakovich appealed that decision in two forums -- to the Chouteau County Superintendent and to arbitration of a grievance pursuant to the collective bargaining agreement.

The District and the teachers had a collective bargaining agreement [CBA] (Joint Exhibit 1) that stated criteria for a RIF in Article XI, Subdivision 2. Reduction of staff, "shall be based on the following criteria; seniority and/or personnel evaluations by the administrative staff." Article VII, Section 1, concerning contracts and notice of re-election, stated that, "Teachers will be assigned in areas of certificate endorsement. Deviations from areas of certification will be by mutual consent." The CBA also included a grievance procedure (Article XVI) that included arbitration. Article XVI, Section 7, Subdivision 4 stated in part:

Decisions by the arbitrator in cases properly before him shall be final and binding upon the parties, subject, however, to the limitations of arbitration decisions as provided by Montana Law.

In July, 1994, in response to the County Superintendent's Prehearing Order, the School District filed a motion in limine to prohibit the introduction of any evidence related to breach of the CBA on the grounds that this claim had been submitted to final and binding arbitration. The County Superintendent issued an August 19, 1994, Order denying the motion but ordering that the proceeding would be stayed until a final arbitration decision was issued.

The arbitration hearing was held on December 6, 1994, and an Opinion and Award was issued on January 20, 1995. The arbitrator concluded that the termination did not violate Mr. Radakovich's rights under the CBA, writing in part:

In the second place, the District did not violate Article XI, Section 1, Subdivision 2 when it added the requirement of endorsements, with preference to multiple endorsements, to the two criteria set forth in the subdivision. The District argument that the fourth sentence of Article VII, Section 1 mandated the addition of the endorsement requirement is well taken. The fourth and fifth sentences of that section clearly provide:

Teachers will be assigned in areas of certificate endorsement. Deviations from areas of certification will be by mutual consent.

Article XI, Section 1, Subdivision 2 and Article VII, Section 1 must be read together. It is well established that in applying a collective bargaining agreement, an arbitrator must give effect to the entire agreement.

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Clearly, for the Agreement to be properly interpreted, Article VII, Section 1 and Article XI, Section 1 must be considered together.

The logic behind that conclusion is apparent. Subdivision 2 contains an implicit requirement that the senior employee possess the minimal qualifications necessary to teach classes that remain after a RIF is effected, and the District has the retained right under the Agreement to make that determination. The most obvious examples would be that a certain requirement exists for some courses, such as advanced mathematics, language or science. Some teachers simply do not have the ability to understand, much less teach, calculus; and it is difficult to imagine a teacher with no language training teaching Spanish or French. The requirement may be less apparent where basic English, science or social studies are concerned, but the same principle applies: The District retains the right to make the decision whether the affected teacher possesses the ability to teach those classes in a manner satisfactory to it. That is, it possesses the ability to decide whether to give its consent to allow the teacher to teach those classes without an endorsement in those areas.

Arbitrator Opinion and Award, pp. 16, 17.

County Superintendent Stollfuss heard the matter on June 27, 1995. The District renewed its earlier motion in limine to exclude rehearing of the CBA issue, arguing that the arbitrator's decision that the CBA was not violated was res judicata. The County Superintendent granted the District's motion and did not reconsider the CBA issue.

The County Superintendent held a hearing on Mr. Radakovich's claim that the RIF violated the requirements of § 20-4-204, MCA (1993) and Due Process. (Section 20-4-204 was amended during the 1997 legislative session. This appeal was decided under the 1993 statute and is not affected by the change in law.) The County Superintendent affirmed the Trustees' decision to RIF Mr. Radakovich. He appealed to the State Superintendent. Having reviewed the County Superintendent's Findings of Fact, Conclusions of Law and Order, the record and the parties' briefs, this State Superintendent of Public Instruction now enters the following:

### **ORDER**

Substantial, credible evidence supports the County Superintendent's Findings of Fact and his Conclusions of Law are correct. The County Superintendent's Order is affirmed.

### **Standard of Review**

This Superintendent's review of a county superintendent's order is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by this Superintendent in ARM 10.6.125.

Findings of fact are reviewed under a clearly erroneous standard. Harris v. Trustees, Cascade County School Districts No. 6 and F, 241 Mont. 274, 786 P.2d 1164 (1990). Colstrip

Board of Trustees, Rosebud County v. Elmer Baldridge, 264 Mont. 199, 870 P.2d 711, 714 (1994). The State Superintendent may not substitute her judgment for that of a county superintendent as to the weight of the evidence on questions of a fact. Findings are upheld if supported by substantial, credible evidence in the record.

Conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

### Discussion

The County Superintendent heard evidence and issued an Order on the questions of whether a RIF was necessary and whether Mr. Radakovich had received due process and his statutory rights under § 20-4-204, MCA (1993). Mr. Radakovich raises three issues on appeal:

1. Did the County Superintendent err in considering the arbitrator's ruling res judicata on the CBA claim?
2. Did the District provide Mr. Radakovich his constitutional and statutory procedural rights?
3. Does the record support that the RIF was an economic necessity?

Issue 1. Should the County Superintendent have heard the CBA claim?

Section 39-31-306 (5), MCA, was enacted by the 1993 Legislature and would be dispositive of this issue if it applied.<sup>1</sup> The statute existed at the time of Mr. Radakovich's termination but his

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<sup>1</sup> Section 39-31-306(5), MCA, states:

An agreement to which a school is a party must contain a grievance procedure culminating in final and binding arbitration of unresolved and disputed interpretations of agreements. The aggrieved party may have the grievance or disputed interpretation of the agreement resolved either by final and binding arbitration or by any other available legal method and forum, but not by both. After a grievance has been submitted to arbitration, the grievant and the exclusive representative waive any right to pursue against the school an

employment was governed by a collective bargaining agreement that was executed in April 1992, and in effect until July 1, 1994. Mr. Radakovich argues that the holding in Frazer Education Association v. Valley County Elementary School District No. 2, 256 Mont. 223, 846 P.2d 267 (1993) [hereinafter Frazer] controls this case and required the County Superintendent to consider the CBA claim despite the arbitrator's ruling that the RIF did not violate the CBA.

Under the holding of Frazer, Mr. Radakovich had the right to pursue remedies before both the County Superintendent and an arbitrator. His exercise of that right is not at issue in this appeal -- he had the right to file in both forums, and he did so. The only issue is whether the County Superintendent could consider the arbitrator's ruling as dispositive of the CBA issue.

In arbitration Mr. Radakovich argued that his RIF violated the terms of the CBA. The arbitrator ruled against this claim and, although the County Superintendent did not use the term res judicata, he accepted the arbitrator's January 20, 1995, Order as controlling and dispositive of the CBA claim. This Superintendent agrees.

The Montana Supreme Court in State ex rel. Sullivan v. School District, 100 Mont. 468, 50 P.2d 252 (1935), originally stated the criteria to be used to determine whether a claim is res judicata:

- (1) the parties or their privies must be the same;
- (2) the subject matter of the action must be the same;

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action or complaint that seeks the same remedy. If a grievant or the exclusive representative files a complaint or other action against the school, arbitration seeking the same remedy may not be filed or pursued under this section. (Emphasis added.)

- (3) the issues must be the same and must relate to the same subject matter; and,
- (4) the capacities of the persons must be the same in reference to that subject matter and to the issues between them.

These elements for res judicata, which have been restated many times by the Court in later cases, exist in this case -- in both proceedings Mr. Radakovich and the school district were the parties, the CBA was the subject matter, the issue was whether the criteria used to choose Mr. Radakovich for RIF violated the terms of the CBA, and the capacity of the District and Mr. Radakovich in relation to this issue is the same.

Mr. Radakovich argues that the parties to the proceeding are not the same because the Scobey Education Association was the party to the arbitration while he personally is the party to this appeal. This argument fails, however, because he is specifically named as the grievant in the arbitration and the order focuses exclusively on his termination. He also argues that the issue is not the same because he is arguing statutory tenure rights not grieving the CBA. As discussed below, however, the County Superintendent did hear the issue of whether statutory rights had been violated. It was only the CBA issue that the County Superintendent considered res judicata because of the arbitrator's ruling that the RIF did not violate the CBA.

#### Issue 2 -- Were Mr. Radakovich's procedural rights met?

Mr. Radakovich was a tenured teacher under § 20-4-203, MCA. He was entitled to the procedural protection of § 20-4-204, MCA, and he was entitled to Due Process. Both the District and the County Superintendent refer to Mr. Radakovich's statutory rights under § 20-4-204, MCA, and procedural rights, "imposed by the State Superintendent." The Montana and the



Federal Constitutions, not this Superintendent, are the source of those procedural rights. "The due process clause of both the Federal and Montana Constitutions protects a tenured teacher's interest in continued employment." Holmes v. Board of Trustees, 243 Mont. 263, 792 P.2d 10, 47 St. Rep. 914 at 918 (1990).

In a termination of a tenured teacher based on a RIF, Due Process requires that a school district have a systematic district-wide plan for cost reduction (Hammer et al. v. Dawson County School District, 13 Ed.Law 25 (OSPI 216-92, March 11, 1994)) and objective criteria fairly applied to decide which teachers will be terminated (Ekwortzel v. Stillwater County School District No. 31, 12 Ed.Law 45 (OSPI 201-92, May 5, 1993)). The County Superintendent found that the District satisfied these requirements and there is substantial credible evidence in the record to support these findings.

Section 20-4-204 requires a recommendation in writing to the trustees of the district from a district superintendent that states clearly and explicitly the specific reasons for the recommendation for termination. The County Superintendent found that the District had complied with this requirement and there is evidence in the record in support of this finding (Respondent's Exhibit 6 (Superintendent's Exhibits #5-1 and #5-2)). The Trustees notified Mr. Radakovich of the recommendation for termination and of his right to a hearing on the recommendation (Respondents Exhibit 6 (Exhibit #6-A)).

The record also shows that the District had a district wide plan for reducing costs and had an objective criteria -- endorsements -- that was fairly applied in selecting individual teachers for

RIF (Respondent's Exhibit 6 (Superintendent's Exhibit #4-A)). Mr. Radakovich was informed of the criteria used to select him for RIF prior to hearing and had the opportunity to meaningfully prepare for the hearing.

Issue 3. Did the record establish that the RIF was justified?

The County Superintendent found that the District determined it had grounds to RIF.

Finding of fact 3 states:

Ultimately the School district determined it would be necessary to make cuts in the general fund of approximately \$144,000.00. Of the cuts approximately \$70,000.00 were personnel cuts which included Mr. Radakovich's position as a Social studies teacher. (Tr. p. 16; Arbitration Decision pp. 9, 10)

County Superintendent Findings of Fact Conclusions of Law and Order, p.2, September 14, 1995.

The District's evidence of a financial basis for its RIF was the fact that the District's 1994-95 maximum budget limit established by statute (§§ 20-9-306 - 308, MCA) was \$144,000 less than the District's projected 1994-95 budget taking into account cost increases. The hearing transcript at page 16 and Respondent's Exhibit 6 (Superintendent's Exhibits #8-1, #8-2 and #9) support this fact and the County Superintendent found it persuasive. (Finding of Fact 3.)

Mr. Radakovich argues that a projected budget shortfall does not establish a revenue shortfall. His evidence established that the Scobey District had a practice of returning to the general fund between \$100,000 and \$200,000 in budgeted, but unspent funds (referred to as "budget remaining"). (See Respondents Exhibit 6 (Exhibit A-5) and deposition of Karen Schaefer.)


Mr. Radakovich established that the District has not spent its budget in the past but this evidence did not convince the County Superintendent that a RIF was not necessary in this case. The County Superintendent found that the District had determined it had financial grounds to RIF and there is substantial credible evidence in the record to support that finding.

### CONCLUSION

The County Superintendent correctly held that an arbitrator's January 20, 1995, decision that Mr. Radakovich's termination was not a breach of the Collective Bargaining Agreement was res judicata of his CBA claim before the County Superintendent. The County Superintendent's conclusions that Mr. Radakovich's procedural rights had been met are correct as a matter of law. There is substantial credible evidence to support the County superintendent finding that a RIF was necessary. The County Superintendent correctly upheld the District's decision to terminate. The Order is AFFIRMED.

DATED this 6<sup>th</sup> day of January, 1998.

RADAKOV1260

  
NANCY KEENAN

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 6<sup>th</sup> day of January, 1998, a true and exact copy of the foregoing DECISION AND ORDER was mailed, postage prepaid, to the following:

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